

Summary: The plaintiff filed a motion to amend the complaint to add a claim for punitive damages. The Court denied the motion finding that there was not sufficient evidence to support a finding by the trier of fact of oppression, fraud, or actual malice so as to support an award of punitive or exemplary damages.

Case Name: CDI Energy Services, Inc. v. West River Pumps, Inc., et al.

Case Number: 1-07-cv-85

Docket Number: 49

Date Filed: 4/15/08

Nature of Suit: 190

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION**

CDI Energy Services, Inc.,)	
)	
Plaintiff,)	ORDER DENYING PLAINTIFF'S
)	MOTION TO AMEND COMPLAINT
vs.)	
)	
West River Pumps, Inc., John Martinson,)	Case No. 1:07-cv-085
Dale Roller, and Kent Heinle,)	
)	
Defendants.)	

Before the Court is the Plaintiff's "Motion to Amend Complaint to Add Claim for Relief Seeking Exemplary Damages" filed on March 21, 2008. See Docket 46. The Defendants filed a response in opposition to the motion on April 2, 2008. See Docket 48. For the reasons set forth below, the motion is denied.

I. BACKGROUND

This action stems from a dispute over the nature and circumstances surrounding the departure of defendants John Martinson, Dale Roller, and Kent Heinle from their employment with the

plaintiff, CDI Energy Services, Inc. (CDI). On November 15, 2007, CDI filed a complaint against the Defendants alleging claims for misappropriation of trade secrets, tortious interference with business relations, breach of the duty of loyalty, violations of N.D.C.C. § 34-02-14 (intent to injure former employer's business), unjust enrichment, unfair competition, civil conspiracy, and conversion. CDI's complaint sought injunctive relief, compensatory damages, and attorneys' fees. See Docket 1. CDI now seeks leave to amend its complaint to add a claim for punitive or exemplary damages. The Court previously set forth the factual background of this case in its order dated December 13, 2007. See Docket 40. However, a brief overview of the facts is warranted.

CDI sells and services oilfield equipment and has an office located in Dickinson, North Dakota. Defendants John Martinson, Dale Roller, and Kent Heinle were the only employees at CDI's Dickinson office in 2007. Martinson was the district manager, Roller was the sales and service representative, and Heinle was the service technician. On October 16, 2007, Martinson, Roller, and Heinle resigned from CDI.

Prior to working for CDI, Martinson and Roller were employed by competitors of CDI, namely, Red Iron Pump and Supply and Weatherford. See Affidavit of John Martinson, Docket 22, ¶ 11. In approximately 2000, representatives of CDI contacted Martinson and Roller and asked them to open an office for CDI in Dickinson, North Dakota, and to solicit customers from their employers. See Affidavit of John Martinson, Docket 22, ¶ 11, Affidavit of Dale Roller, Docket 23, ¶ 3. Both Martinson and Roller went to work for CDI in 2000 and brought customers/clients with them. Kent Heinle began his employment at CDI's Dickinson location in April 2007.

In 2007, the individual defendants apparently decided to leave CDI and open a competing business. In August 2007, they incorporated West River Pumps, Inc. for that purpose. See Affidavit

of John Martinson, Docket 22, ¶ 21. West River Pumps' trade name was registered in 2007. Prior to leaving CDI, the individual defendants sought legal advice concerning potential legal issues involved with their decision to leave CDI. See Affidavit of John Martinson, Docket 22, ¶ 22. Based on the "advice" of counsel, the individual defendants contacted customers/clients of CDI in an effort to obtain their written or verbal permission to remove pumps from CDI's office. On October 15, 2007, Martinson, Roller, and Heinle removed some customers' spare pumps from CDI's office that were awaiting service or repair. See Affidavit of Danny Matherne, Docket 11-2, p. 5. Martinson has admitted that he contacted several customers of CDI to solicit and entice them to bring their business to West River Pumps, but he contends that all such contacts were made on his personal time and that he did not believe it was improper because CDI had encouraged him to follow the same procedure when he was hired by CDI in 2000. See Affidavit of John Martinson, Docket 22, ¶ 23.

The individual defendants have provided the Court with a description of all records taken from CDI in October 2007. CDI points out that Martinson admitted that he removed an original binder of price lists for parts, the original file pertaining to Continental Resources, CDI's largest customer, as well as a folder with a list of customer pumps and note cards containing detailed customer pump repair information. See Docket 22, ¶ 19. Martinson contends that none of the materials that he removed were identified as CDI documents, and that all of the information taken by the individual defendants can be obtained from the public domain or from the oilfield customers. The individual defendants further state that the records and documents were never used and, contrary to CDI's allegations, no other records, documents, or files were taken or copied.

II. LEGAL DISCUSSION

Section 32-03.2-11(1) of the North Dakota Century Code provides, as follows:

In any action for the breach of an obligation not arising from contract, when the defendant has been guilty by clear and convincing evidence of oppression, fraud, or actual malice, the court or jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant. Upon commencement of the action, the complaint may not seek exemplary damages. After filing the suit, a party may make a motion to amend the pleadings to claim exemplary damages. The motion must allege an applicable legal basis for awarding exemplary damages and must be accompanied by one or more affidavits or deposition testimony showing the factual basis for the claim. The party opposing the motion may respond with affidavit or deposition testimony. If the court finds, after considering all submitted evidence, that there is sufficient evidence to support a finding by the trier of fact that a preponderance of the evidence proves oppression, fraud, or actual malice, the court shall grant the moving party permission to amend the pleadings to claim exemplary damages. For purposes of tolling the statute of limitations, pleadings amended under this section relate back to the time the action was commenced.

N.D.C.C. § 32-03.2-11(1). This statute provides a substantive right and, therefore, applies to this federal court action. See Atkinson v. McLaughlin, No. 1:03-cv-091, 2007 WL 557024 at *7 (D. N.D. Feb. 15, 2007) (applying North Dakota’s punitive damage statute in a case in which jurisdiction was predicated upon diversity of citizenship); see also Myers v. Richland County, 288 F. Supp. 2d 1013, 1021 (D.N.D. 2003) (“Exemplary damages statutes provide a substantive right and therefore state law applies.”).

CDI contends that there is the requisite evidence of oppression or actual malice. For the purposes of punitive damages, the term “oppression” means “subjecting a person to cruel and unjust hardship in conscious disregard of that person’s rights.” See North Dakota Pattern Jury Instructions C-72.10; see also Ingalls v. Paul Revere Life Ins. Co., 561 N.W.2d 273, 284-85 (N.D. 1997); Harwood State Bank v. Charon, 466 N.W.2d 601 (N.D. 1991); Napoleon Livestock Auction, Inc. v. Rohrich, 406 N.W.2d 346, 359 (N.D. 1987). “Actual malice” is defined as “an intent with ill will

or wrongful motive to harass, annoy, or injure another person.” See North Dakota Pattern Jury Instructions C-72.16; see also Ingalls v. Paul Revere Life Ins. Group, 561 N.W.2d 273 (N.D. 1997); McLean v. Kirby Co., 490 N.W.2d 229 (N.D. 1992); Stoner v. Nash Finch, Inc., 446 N.W.2d 747 (N.D. 1989).

Actual malice is the actual state or condition of the mind of the person who did the act. Direct evidence of actual malice is not required. Rather, the character of the act itself, with its surrounding facts and circumstances, may be inquired into for the purpose of ascertaining the motive or purpose which influenced the mind of the party in committing the act. Thus, upon the consideration of these, if that motive is found to be improper and unjustifiable, the law authorizes the jury to find it was malicious.

Stoner v. Nash Finch, Inc., 446 N.W.2d 747, 754 (N.D. 1989).

At this stage of the proceedings, the Court must determine whether CDI has demonstrated that there is a factual basis for a claim of punitive damages and whether there is sufficient evidence to support a finding by the trier of fact that a preponderance of the evidence establishes oppression or actual malice on the part of the Defendants.

In support of its request for punitive damages, CDI contends that the allegations contained in its complaint support the inference that the Defendants imparted a wish to injure CDI. CDI contends that those allegations provide the legal basis for a finding of malice or oppression. CDI contends that the affidavits of Martinson and Matherne provide the factual basis in support of CDI’s claim for exemplary damages. CDI contends that Martinson’s affidavit provides evidence that the Defendants acted with the intent to do wrongful acts or with the wrongful motive to injure CDI. Specifically, CDI contends that the Defendants’ intent was evidenced by Martinson’s admission that, while still employed with CDI, he contacted existing CDI customers about whether they would take

their work to West River Pumps, and that Martinson removed price lists for parts, a file pertaining to a customer, and lists of customers' pumps and repair information.

The Defendants contend that CDI has presented insufficient evidence of actual malice or oppression to allow a claim for punitive damages. The Defendants argue that CDI has failed to establish that there was an intent to perform the wrongful acts or of a wrongful motive to injure. The Defendants contend that because they consulted an attorney and acted upon the advice of counsel and believed they were acting within the law, that the requisite intent or wrongful motive is lacking. The Defendants further contend that they were not aware of any North Dakota statutes concerning duty of loyalty or misappropriation of trade secrets and that any mistaken beliefs they had were good faith mistakes based on their previous experiences with CDI and on advice received from counsel.

Having thoroughly reviewed the evidence submitted by the parties, the Court finds that there is not sufficient evidence to support a finding by the trier of fact of oppression, fraud, or actual malice so as to support an award of punitive or exemplary damages. Although the Defendants' lack of knowledge of the law does not excuse any alleged violation of the law, the facts and circumstances surrounding the manner in which the Defendants acted does not support a finding of malice or oppression. The record reveals that the Defendants sought legal advice from counsel and followed the advice they were given. The Defendants further believed that their actions were lawful because CDI had acted similarly when it hired John Martinson and Dale Roller in 2000. The Court finds that the record contains insufficient evidence of oppression or actual malice on the part of the Defendants to allow CDI to amend the complaint to allege a claim for punitive damages.

III. CONCLUSION

For the reasons set forth above, the Plaintiff's "Motion to Amend Complaint to Add Claim for Relief Seeking Exemplary Damages" is **DENIED**. (Docket 47).

IT IS SO ORDERED.

Dated this 15th day of April, 2008.

/s/ Daniel L. Hovland

Daniel L. Hovland, Chief Judge
United States District Court